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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 291

**WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN
CROMWELL, ET AL., ETC., APPELLANTS,**

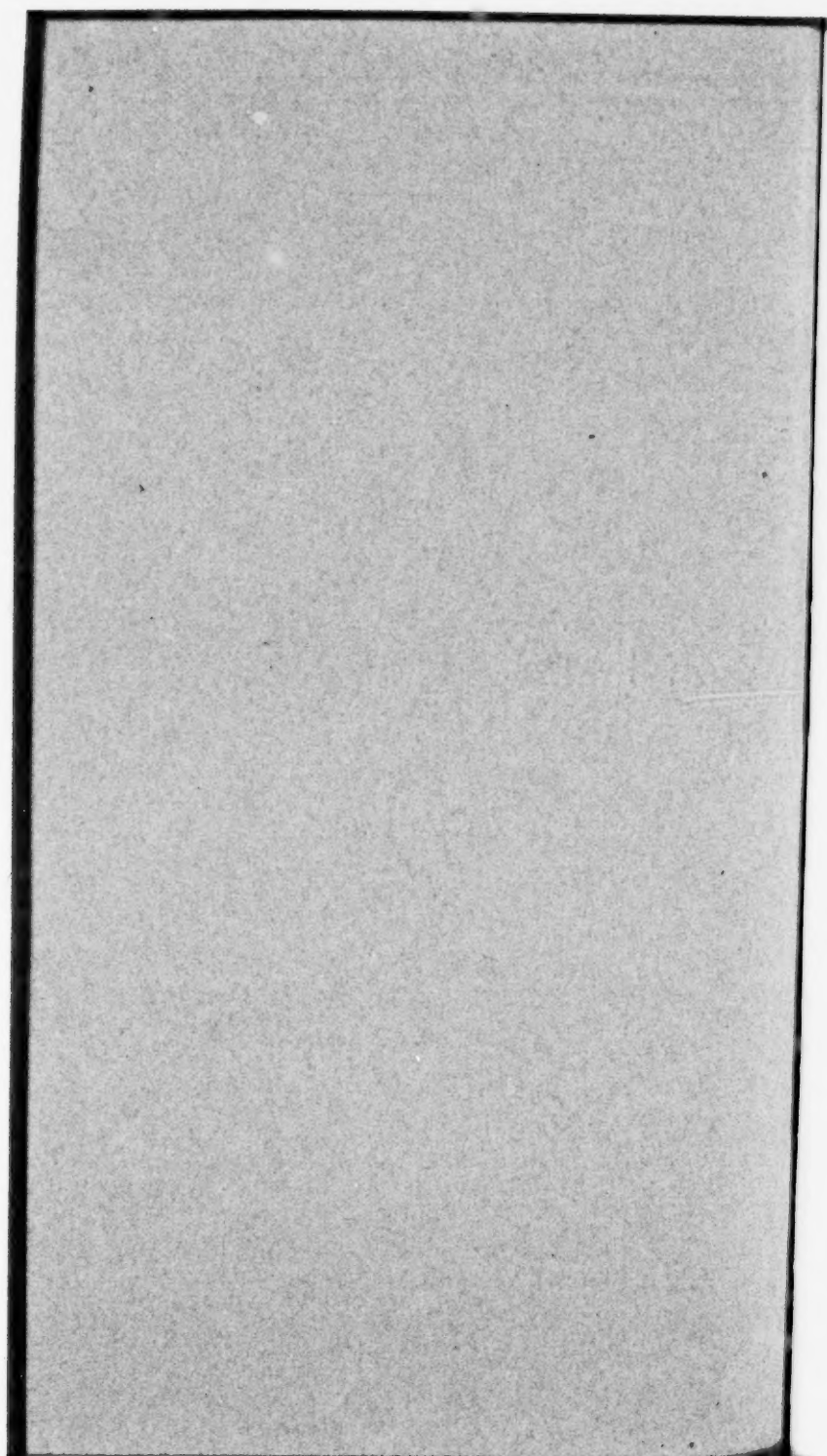
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED FEBRUARY 21, 1925

(30,888)



(30,888)

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No. 291

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN
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[fol. 1]

IN COURT OF CLAIMS

No. B-13

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL,
Arthur Iselin, George A. Vondermuhll, Oliver Iselin, and Ken-
neth P. Budd, Co-partners, Doing Business under the Firm Name
of William Iselin & Company, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed January 31, 1922

To the Honorable the Judges of the Court of Claims:

The petition of William E. Iselin, James W. Cromwell, Lincoln Cromwell, Arthur Iselin, George A. Vondermuhll, Oliver Iselin and Kenneth P. Budd, co-partners, doing business under the firm name of William Iselin & Company, the plaintiffs above named, respectfully shows to the court and alleges:

First. Said plaintiffs are the owners of the claim herein set forth. No assignment or transfer of said claim or any part thereof or interest therein has been made, and said plaintiffs are justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets. Said plaintiffs are and at all times hereinafter mentioned were engaged in business and trading under the firm name of William Iselin & Company and said firm of William Iselin & Company is and at all times herein-[fol. 2] after mentioned was a co-partnership composed of said plaintiffs. Said plaintiffs have, and each of them has, at all times borne true allegiance to the Government of the United States of America, and have not, nor has any of said plaintiffs, in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

Second. Petitioners' claim for the sum of \$30,000.00 is based upon a written contract evidenced by an offer in writing dated February 2, 1920, made by plaintiffs, by their representative, E. I. McDowell, duly authorized thereto, and addressed to Materials Disposal & Salvage Division, Office of the Director of Air Service, United States of America, and an acceptance of said offer by said Materials Disposal & Salvage Division Office duly acting for the United States of America, by letter dated February 10, 1920, signed on behalf of the Government of the United States, War Department, by Robert Coker, Captain, A. S. A., District Manager, Materials Disposal & Salvage Division, by Frank W. Weeks, Sales Manager.

Third. The agreement arising from the said offer and the acceptance thereof was entered into in the following circumstances:

On or prior to February 2, 1920, a salesman acting for defendant and carrying Government samples, called on plaintiffs and invited them to bid on surplus aeroplane linen held by defendant, stating that the surplus linen so offered for sale was according to the samples then shown and of first quality.

On February 2, 1920, plaintiffs, through their representative, E. I. McDowell, duly authorized thereto, offered, by the following letter, to purchase a part of this aeroplane linen:

[fol. 3]

"New York, Feb. 2nd, 1920.

Materials Disposal & Salvage Division, Office of the Director of Air Service, Building B, Sixth and B Sts. N. W. Washington, D. C.

GENTLEMEN: I herewith submit my firm offer for approximately 168,400 yards of 38-inch Grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

This offer is for immediate acceptance on usual Government terms.

Yours very truly, E. I. McDowell."

This offer was accepted by the Materials Disposal & Salvage Division Office, duly acting for defendant, by letter dated February 10, 1920, as follows:

"War Department, Air Service, Materials Disposal & Salvage Division, New York District Office

February 10, 1920.

From: Air Service, Materials Disposal and Salvage Division, N. Y. District.

To: E. I. McDowell, 20 Thomas St., N. Y. C.

Subject: Sale No. 2545.

1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.

2. Inasmuch as we have your check for \$13,987.20 to cover 10% [fol. 4] of the sale, it is requested that you send this office Certified Check for \$125,884.80 to cover the balance due together with your shipping directions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award.

Robert Coker, Capt., A. S. A., District Manager M. D. & S. Division, by F. W. Weeks, Frank W. Weeks, Sales Manager."

Fourth. Pursuant to said agreement 144,245½ yards of linen were delivered to plaintiffs and duly paid for at the rate of ninety-three cents per yard.

Fifth. Said linen was not of the grade and quality represented by defendant and agreed to be purchased by plaintiffs and sold by defendant as aforesaid, but on the contrary was of poor quality and in consequence plaintiffs were damaged in the sum of Thirty thousand dollars (\$30,000) after allowing all refunds or offsets.

Sixth. Subsequent to the delivery of said linen to plaintiffs, officers of the defendant, duly authorized and directed thereto, inspected said linen and admitted that it was not of first quality.

Seventh. Subsequent to the delivery of said linen to plaintiffs, plaintiffs claimed compensation from defendant on account of the breach of the agreement above set out, and the defendant's officers and agents, duly authorized and directed thereto, while admitting [fol. 5] that plaintiffs were entitled to compensation, were of the opinion that they were without authority to make such compensation. Copies of the opinions of the Comptroller General and of the Acting Judge Advocate General are attached hereto marked Annex A and Annex B respectively.

Wherefore, your petitioners pray that their said claim may be duly approved and allowed by this Honorable Court and that a judgment for the payment thereof be granted.

Barry, Wainright, Thacher & Symmers, Attorneys for Plaintiffs, 59 Wall Street, Borough of Manhattan, New York City, by Dallas S. Townsend.

Sworn to by Oliver Iselin. Jurat omitted in printing.

[fol. 6] Annex A, General Accounting Office, Washington

Review No. 445

December 17, 1921.

Wm. Iselin and Company applied November 28, 1921, for a review of the action of the War Department Division of the General Accounting Office in disallowing by settlement No. 764581, dated October 25, 1921, its claim for \$26,828.92 on account of damages alleged to have resulted from the fact that a certain quantity of linen

purchased by the claimant from the Air service of the Army did not comply with the requirements of the terms of sale.

It appears that after a representative of the Air Service had called on claimant and exhibited a sample of aeroplane linen to be sold by the Government, claimant submitted an offer of 93 cents per yard for approximately 168,400 yards of linen, giving certain specifications and further stipulating "goods to be firsts."

In advertising this linen for sale it was stipulated that the material would be sold "as is;" that physical inspection was invited; that the specifications and quantities on hand were based upon best information available; and that no guarantee on behalf of the Government was given.

It is admitted by the Air service that the advertisement did not come to claimant's notice until after its bid had been submitted and accepted. As the bid submitted was accepted unconditionally I think there can be no doubt that the Government obligated itself to furnish linen in accordance with the specifications and description given by the claimant in its bid and that upon failure of the linen to comply with said requirements the sale could have been rescinded, the goods immediately returned and the purchase price refunded. It appears, however, that the imperfections of the linen were not discovered until about five months after delivery and after a considerable quantity [fol. 7] had been processed, thereby making it impossible to rescind the sale and return the material in the condition in which it was in when delivered. But under the circumstances I do not think the delay in discovering that the linen was defective can operate to relieve the Government of all liability under its obligation to furnish linen of the character, quality and condition stipulated in the sale agreement. However, the claim is clearly one for damages resulting from a breach by the Government of the sale contract and there is no appropriation available for the payment of such claims. Therefore, the claim can not be adjudicated by and paid on the certificate of the General Accounting Office, under any appropriation.

In a report dated September 21, 1921, the chief, Material Disposal and Salvage Division, by authority of the chief of Air Service, stated that the funds received from this sale were being held in "suspense account" and would continue to be so held until settlement of this claim. I infer from this that the funds are carried in a special deposit account and have not been covered into the Treasury. If such be the case I see no reason why the War Department should not determine the extent of the damage and refund the amount thereof to claimant from the proceeds of sale.

The amount claimed is 20% of the net amount paid by claimant for the linen delivered and is based on the assumption that the value of linen "seconds" is 20% less than the value of "firsts." This assumption may or may not be correct. The evidence before me is not sufficient upon which to base a determination on that point.

It appears that there were "numerous other bidders" for the linen sold to claimant and it is possible that some, if not all, of the other bidders offered to buy the linen "as is" in accordance with the published advertisement without any guarantee from the Government.

If so, it would seem that the highest bid on these terms would be proper evidence as to the actual value of the linen sold and that the difference between said value and the amount paid by claimant would [fol. 8] be a fair and reasonable measure of damages in this case and if said amount is acceptable to claimant its payment from proceeds of sale, if not yet covered into the Treasury, would seem to be authorized.

If the proceeds of sale have been covered into the Treasury it would be proper for the War Department to determine the amount of the damage and report the matter to Congress for an appropriation.

Upon a review of the matter no differences are found and the settlement is sustained.

J. L. McCarl, Comptroller General.

ANNEX B

Contracts. Finley: wrs. JAG 400.703. War Department, J. A. G. O. 2nd Ind.

June 14, 1921.

To the Director of Sales:

1. By order of the Assistant Secretary of War you submit to this office for remark and recommendation the claim of William Iselin & Company of New York for an allowance of 20% upon the purchase price of certain brown airplane linen purchased of the Government by said Company on the ground that the accepted purchase offer was for "firsts" while delivery was of "second."

2. By publication in Air Service bulletins and trade papers the linen in question was offered for sale by the Government, such published notices describing the goods offered, but containing no representation as to their quality. Bids were to be received until 3 o'clock p. m., February 2, 1920. In January, 1920, a sales agent of the Government called upon the firm of William Iselin & Company, exhibited a sample of linen and offered same for sale. This firm thereupon through one E. I. McDowell, submitted a bid in the following language:

"I herewith submit my firm offer for approximately 168,400 yards [fol. 9] 38-inch Grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93c per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

"This offer is for immediate acceptance on usual Government terms."

The bid was accepted and notice of acceptance given by letter as follows:

"This is to advise that Washington has awarded you 150,400 yards of 38" Grade "A" Airplane Linen at 93c. per yard. This linen is listed on sheet 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.

"Inasmuch as we have your check for \$13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for \$125,884.80 to cover the balance due together with your shipping directions.

"This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Material Disposal & Salvage Division, 350 Madison Ave., N. Y. C.

"Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

Deliveries were thereupon made to claimant and the full purchase price paid in the sum of \$139,872.00. No complaint as to the goods sold or their quality seems to have been made to the Government's representatives until some time in June, 1920, when upon re-sale as "firsts" after bleaching a customer rejected a consignment as not "firsts." Iselin & Company claim that an examination then made disclosed that the linens were not "firsts" and referred the matter to the New York representative of the Government sales agency, the Material Disposal and Salvage Division, Office of the Director of Air Service of the Army, and was advised to continue the bleaching operations and make claim for an allowance from the Government for damages sustained. The said New York representative denies having so advised claimant. Iselin & Company continued the bleaching operations until substantially all the linen was so processed. The claim of 20% on the purchase price of the entire yardage is based on the alleged difference in value between first and second quality linens.

Certain objections are made by the purchaser going to the quantity, grade and color of the goods delivered. For the most part these contentions are disputed by the Air Service. It appears, however, that the Air Service has caused an inspection of the remaining unbleached fabric by an expert fabric inspector who found that the linen while bought by the Government as Grade "A" or "firsts" quality was not in fact first quality. It does not appear what significance or meaning is attached in the trade to the expression "goods to be firsts" and therefore it is not possible to say whether that condition of the sale has been fulfilled or not; but in the view taken by this office it is immaterial to consider that question or the correctness of the arbitrary claim of 20% of the purchase price as the basis of the claimant's damage.

3. Although the advertisements of the Government did not describe the offered linen as "firsts," but on the contrary offered the goods "as is," expressly disclaiming a guarantee on behalf of the Government, yet the offer of Iselin & Company departed from the terms of the advertisement and was conditioned "goods to be firsts."

This offer was unconditionally accepted by the Government's representatives and the Government thereby became obligated to deliver goods of the quality so defined, regardless of the conditions of the prior advertisement. If the goods delivered were not "firsts" as that term is understood in the linen trade the purchaser had the option either of rescinding the sale contract and returning the goods or of keeping the goods and asserting a claim of damages for the breach of contract. Since by reason of the bleaching process the purchaser has [fol. 11] put it out of his power to return the goods in their original form, he is relegated to a claim for damages as his only remedy if he has been injured. Such a claim for damages is, of course, unliquidated in amount and therefore the administrative officers of the War Department are without authority to entertain or adjust it. Claims for unliquidated damages on account of contracts of the War Department are cognizable by the proper accounting officers of the Treasury Department or as legal actions in the Court of Claims. It is recommended that the claimant be advised accordingly.

E. A. Kreger, Acting Judge Advocate General.

[fol. 12] II. GENERAL TRAVERSE—Apr. 3, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. ARGUMENT AND SUBMISSION OF CASE

On January 13 and 14, 1925, this case was argued and submitted on merits by Mr. Dallas S. Townsend, for the plaintiffs, and by Mr. John E. Hoover, for the defendant.

[fol. 13] IV. **Findings of Fact, Conclusion of Law, and Opinion by Downey, J.**—Entered January 26, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiffs are citizens and residents of the United States, and in all respects duly qualified to sue as plaintiffs in this court. At all times material herein they were engaged in business as copartners, doing business under the firm name of William Iselin & Company.

II

In January, 1920, the United States, through the Material Disposal and Salvage Division of the office of the Director of Air Service of the Army, was in possession of a considerable quantity of surplus airplane linen which it desired to sell.

III

In January, 1920, two different parties claiming to be authorized representatives of the United States in that behalf exhibited samples and solicited bids from the plaintiff for the purchasing by it of said linen, and on January 19, 1920, the plaintiff, by E. I. McDowell, acting in that behalf, submitted to Harry Stultz, one of said parties, a bid, to him addressed, for said linen, referring to it as "approximately 168,400 yards," the aggregate of the two items mentioned in the advertisement hereinafter referred to, at 0.85 per yard "linen to be as per sample herewith."

Said Stultz was not an authorized representative of the United States with authority to sell said linen, but was operating in his own behalf, and no proceeding was had under said bid, so far as appears [fol. 14] from the record. On February 2, 1920, said Stultz submitted to the material disposal and salvage division of the Air Service a bid for identic quantities of said linen in two items as in said advertisement set out, at a price of \$0.87½ per yard.

IV

Previous to the submission of said bid by the plaintiff to said Stultz, namely, on January 15, 1920, the material disposal and salvage division of the Air Service had advertised in different publications, among them the Journal of Commerce and Commercial Bulletin, published in the city of New York, the proposed sale of a number of items of surplus material on hand, said aircraft linen included, in two items of 68,400 yards and 100,000 yards, and invited bids therefor, bids to close February 2.

In said advertisement the aircraft linen to be sold was described as grade A; it was stated that bids might be made for 1,000 yards or multiples thereof, or for any entire lot; that bids would be received until 3 o'clock a. m., of February 2, 1920; that the bidders would be notified on or before February 5, of the yardage awarded, upon receipt of which notification they would be required to forward a check or draft for 10 per cent of the purchase price, all materials to be removed and paid for within 30 days; that the materials would be sold "as is" at point of storage; that inspection is invited and that "specifications and quantities on hand are based upon the best information available, but no guaranty on the part of the Government is given."

V

It does not appear that the representative of the plaintiff acting in its behalf had seen the advertisement referred to at or before the

time that the bid was submitted to said Stultz, but said advertisement came to his attention very shortly thereafter and before February 2, 1920, under which date the said representative of the plaintiff, namely, E. I. McDowell, acting for and on behalf of the plaintiff, submitted to the Materials Disposal and Salvage Division of the Air Service the following bid:

New York, Feb. 2nd, 1920.

Materials Disposal & Salvage Division, Office of the Director of Air Service, Building B, Sixth and B Sts. N. W., Washington, D. C.

GENTLEMEN: I herewith submit my firm offer for approximately 168,400 yards of 38-inch grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

This offer is for immediate acceptance on usual Government terms.

Yours very truly, E. I. McDowell.

[fol. 15]

VI

Under date of February 10, 1920, after the opening and consideration of the bids submitted under said advertisement, there was sent to plaintiff's said representative the following communication:

War Department, Air Service, Materials Disposal & Salvage Division, New York District Office

February 10, 1920.

From: Air Service, Materials Disposal and Salvage Division, N. Y. District.

To: E. I. McDowell, 20 Thomas St., N. Y. C.

Subject: Sale No. 2545.

1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955, item 1—65,400 yards, and sheet No. 2879, item 6—85,000 yards.

2. Inasmuch as we have your check for \$13,987.20 to cover 10% of the sale, it is requested that you send this office certified check for \$125,884.80 to cover the balance due, together with your shipping directions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award.

Robert Coker, Capt., A. S. A., District Manager M. D. & S. Division, by F. W. Weeks, Frank W. Weeks, Sales Manager.

It does not appear that there was any acceptance of plaintiff's bid otherwise than as embodied in the communication last above quoted.

VII

Thereafter, at various times, deliveries were made to the plaintiff and payments made by it for such deliveries, at the rate of its bid price of 0.93 per yard. The deliveries were short of the estimated quantity, for which storage a proper proportion of repayment was made to the plaintiff, leaving the aggregate amount paid by the plaintiff, \$134,144.60.

VIII

Sometime after the purchase of the linen by the plaintiff, namely, about May, 1920, it resold 30,000 yards thereof, for delivery in June, said linen to be bleached by the plaintiff and delivered in that condition at \$1.60 per yard. After being bleached this linen was delivered to the purchaser but was by him rejected on the ground that by reason of defects therein it was not of first quality. It was however, agreed that another 30,000 yards should be substituted therefor, which was done by selection from the entire lot, and after bleaching was delivered. The purchaser maintained that this lot was likewise not of first quality, but the plaintiff's contention was that it was in fact of that quality.

By reason of this rejection upon the ground that the linen was not of first quality, complaint was made by the plaintiff to the Material Disposal and Salvage Division, as a result of which there were several detailed inspections of the materials by experts representing both parties. The defects discovered were of a minor character but they were such as to warrant the conclusion that the linen as a whole was not of first quality. It does not appear that it was not grade A.

IX

The term "grade A" is a term of construction. The term "firsts" and "seconds" are terms of quality. The term "grade A" was used in the trade, entirely separate and apart from the designation of quality as indicated by the terms "firsts" and "seconds," and if the construction of a fabric was such as to entitle it to the designation "grade A" it was grade A, irrespective of quality.

X

At the time of this transaction linen of the quality designated as "seconds" was worth, in the trade, approximately 25% less than

"firsts." It does not appear from the record at what price or prices the plaintiff sold this linen or what actual loss, if any, it sustained in connection with the purchase and sale thereof.

CONCLUSION OF LAW

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover, and it is therefore adjudged that plaintiff's petition be dismissed with judgment in favor of the United States for cost of printing the record herein, to be taxed and collected by the clerk.

OPINION

DOWNEY, Judge, delivered the opinion of the court:

The plaintiff bid to the material disposal and salvage division of the Air Service of the Army for the purchase of a large quantity of surplus airplane linen, specifying in its bid that the goods should be firsts. An award was thereafter made to plaintiff of certain quantities of grade A airplane linen, and the award was no doubt made in response to plaintiff's bid. Previous to the submission of the bid the proposed sale of these and other materials had been advertised in trade journals, the advertisements stating the terms and conditions of the sale and plaintiff's representative had seen this advertisement before submitting its bid. The form of the bid and award are material. In lieu of repetition here reference is made to Findings V and VI.

[fol. 17] The contention is that the United States accepted plaintiff's bid, including the stipulation that the goods should be "firsts," that they were not in fact "firsts," and that the plaintiff, having paid for the goods at the bid price before this condition was discovered, suffered loss by reason thereof.

There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis.

Plaintiff's theory is, and necessarily so, that there was an acceptance of its bid, the imposed condition as to quality included, and in this contention is found the fundamental error. Confusion in connection with its consideration is to be avoided by suggesting that, used in relation to fabrics, "grade A" and "firsts" do not mean the same thing. "Grade A" is a term of construction, referring to the number of threads per inch crosswise and lengthwise, etc., while "firsts" is a term of quality, so that a fabric may be grade A and not be of first quality.

Previous to the submission of its bid plaintiff's representative had seen the advertisement published in trade journals for the sale of this and other materials, in which in two items this linen is referred to as grade A. It may readily be assumed, since the plaintiff was

engaged in the business of handling fabrics, that it was fully conversant with the fact that grade A did not necessarily mean first quality, and that this knowledge on its part furnishes the motive for the injection into its bid of the stipulation that the goods should be firsts.

The essential error is in assuming that there was an acceptance of plaintiff's bid. In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word "accepted" or any word of similar import used, or any reference to plaintiff's bid. This communication notified plaintiff of the award to it of a quantity of linen, which might or might not comply with the stipulation as to quality contained in plaintiff's bid, and can not by any possibility be construed as an acceptance upon the condition attempted to be imposed that the goods were to be firsts.

The award was in accordance with the terms of the published advertisement, with which plaintiff's authorized representative was familiar, and while it is not necessary to decide the question, it may be suggested that it probably was the only sort of an award authorized. The bid and the award being at variance in an essential particular, it can not be contended that the award constituted an acceptance of the bid.

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modifications suggested." *Minneapolis & St. Louis Ry. v. Columbus Rolling Mill*, 119 U. S. 149, 151. See also *National Bank v. Hall*, 101 U. S. 43, 50.

[fol. 18] Aside from the conclusion to be drawn from the terms of the bid and the award, it is to be noted that the advertisement, with which plaintiff was familiar before the submission of the bid, provided that the materials would be sold "as is" at point of storage, invited inspection, and provided that no guarantee on behalf of the Government is given.

When the plaintiff received the notice of the award to it of this linen in the terms in which it was couched it was bound to observe that there was no acceptance of other conditions which it had seen fit to impose in the submission of its bid, and since the bid and the award did not constitute a contract it was at liberty to decline to proceed further with the transaction. This it was in better position to do because the terms of sale did not require any advance payment by bidders.

For the reasons stated and apparently without necessity of going further into the details of the transaction we have concluded that plaintiff is not entitled to recover and have directed judgment according.

Graham, Judge; Hay, judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 19]

V. JUDGMENT

At a Court of Claims held in the City of Washington on the 26th day of January, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Six hundred and thirty-one dollars and three cents (\$631.03), the cost of printing the record in this court to be collected by the Clerk, as provided by law.

By the Court.

[fol. 20] VI. PETITION FOR APPEAL—Filed February 5, 1925

From the judgment rendered in the above-entitled cause on the 26th day of January, 1925, in favor of the defendant, the plaintiffs, by their attorneys of record, on the 4th day of February, 1925, make application for and give notice of, an appeal to the Supreme Court of the United States.

Barry, Wainwright, Thacher & Symmers, by Dallas S. Townsend, Attorneys of Record, 59 Wall Street, New York, N. Y.

VII. ORDER ALLOWING APPEAL

It is ordered by the court this 9th day of February, 1925, that the plaintiffs' application for appeal be and the same is allowed.

[fol. 21]

IN COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Downey, J.; of the judgment of the court; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 12th day of February, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,888. Court of Claims. Term No. 291. William E. Iselin, James W. Cromwell, Lincoln Cromwell, et al., etc., appellants, vs. The United States. Filed February 21, 1925. File No. 30,888.

(7036)